82-2132

CASE NUMBER _____

SUPREME COURT OF THE UNITED STATES

1983

WARREN K. LEWELLEN, et al
Appellants

VS

COMMISSIONER OF INTERNAL REVENUE
Appellee

On Appeal from the United States

Court of Appeals for the First Circuit

JURISDICTIONAL STATEMENT

Warren K. Lewellen, pro se
Paula K. Lewellen, pro se
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Bedford, Massachusetts
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(617) 275-7784

(b) Warren K. and Paula K. Lewellen, pro se appellant; Commissioner of Internal Revenue, appellee

(c) Table of Contents

(d) Reference to reports from below

(I) Memorandum of authorities by IRS, Boston app. page

(II) Tax Court memorandum app. page

(III) Appeal Court "Per Curiam" decision app. page

(e) Grounds for Jurisdiction

(I) Section 7482 of the Internal Revenue Code of 1954

(II) Appeal Court for the First Circuit Judgement February 23, 1983 app. page

(III) Title 28 Section 1254 of the United States Code

(f) Constitutional Provision Amendment IV to the Constitution

"The Right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated." We consider the errors and omissions by IRS to be an unreasonable seizure of taxes on nearly $200,000.00 of alleged income.

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(a). Issues Presented

1. Whether late filing of IRS Notices of Deficiency for the years 1970 and 1971 precludes their further consideration.
2. Whether the losses on beef cattle operations may be deducted from farm losses as found by the Tax Court.
3. Whether the income from the rental of space in farm buildings is reportable as farm income.
4. Whether certain costs of local real estate taxes and mortgage interest may be transferred from farm expenses to cost of land sold.
5. Whether certain errors by the Lewellens in the allocation of labor costs may be corrected by

deleting them from farm losses and adding them to cost of land sold.

6. Whether an error by the Lewellens in reporting income of $2,842.20 in 1970 when it had already been reported in 1969 may be corrected.

7. Whether certain errors in the claims by IRS of unreported income may be corrected.

8. Whether certain amounts of income from sales of land ordered held in escrow by the Middlesex Superior Court and awarded to the complainant may be deleted.

9. Whether the amounts paid to the Federal Land Bank prior to their foreclosure may be added to the cost of land sold.

(g) Statement of the Case

The primary purpose of this appeal is not to challenge the findings of the Tax Court and the Appeal Court with regard to the inacceptability of our farm losses and the non-applicability of capital gains treatment of our land sales, rather it is for the purpose of establishing the amount of additional taxable income after all the errors of omission and commission have been corrected.

We note that although the Appeal Court hints that had it been the Court of first impressions it might have different findings from the Tax Court.

We have given up on farm losses and capital gains because those two questions seem to have overwhelmed consideration of other questions such as

determination and correction of errors in IRS claims.

When one addes the capital gains income on land sales reported in the six 1040D ($46,556.59) to the increases in taxable income claimed by IRS on land sales ($90,753.77) to get a total of $137,310.36 and then it is discovered that the total gain from the sales of land was only $93,113.75 it becomes pretty obvious that something is wrong. We don't believe that it is the intention of Congress for IRS to take 100% of the gains from the sales of our land plus 47% more ($44,196.61) for some unexplained, unjustified reasons. Furthermore, IRS seems to have trouble with simple arithmetics in arriving at farm income where errors totaling 18% are included in both IRS and Tax

Court findings.

(h) Statement of the Reasons why the questions presented are substantial.

This case is against a small family farm owned by ailing elderly parents with a semi-invalid son as manager-operator. On the basis of the Tax Court decision IRS placed a lien of $75,000.00 on the farm and have collected over $10,000.00 in bank accounts. If the answers to paragraph (a) above are favorable to the Lewellan there will be no problem of paying additional taxes, if the answers are unfavorable and IRS proceeds with a foreclosure it is very likely the farm will be lost.

The exorbitant claims by IRS are based largely upon the disallowance of farm lossed and the unacceptability of

capital gains treatment of the income from sales of land along with associated errors of commission and omission. The details will be included in the brief. The summations of the IRS claims and the results of eliminating their errors are set forth below under "IRS Claims" and "WKL Claims".

Year	IRS Claims	WKL Claims	Difference
1970	$41,769.42	($5,166.87)	$46,936.29
1971	42,516.94	1,165.00	41,351.94
1972	41,383.51	(3,958.92)	45,342.43
1973	22,065.70	(4,637.55)	26,703.20
1974	26,041.71	2,834.54	23,207.17
1975	8,531.32	(958.99)	9,490.31
TOTAL 1970-1975	$182,208.60	($10,722.79)	$193,031.34

Warren K. Lewellen

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Paula K. Lewellen

Paula K. Lewellen, pro se

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APPENDIX TO JURISDICTIONAL STATEMENT

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1161

WARREN K. LEWELLEN, ET AL.,
Petitioners, Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent, Appellee.

APPEAL FROM THE UNITED STATES TAX COURT
[Hon. Howard A. Dawson, Jr., Judge]

Before

Coffin, Chief Judge,

Campbell and Breyer, Circuit Judges.

Warren K. Lewellen, and Paula K. Lewellen on brief, pro se.

Glenn L. Archer, Jr., Assistant Attorney General, Michael L. Paup, Robert A. Bernstein, and Thomas A. Gick, Attorneys, Tax Division, Department of Justice, on brief for appellee.

February 23, 1983

APPENDIX A

PER CURIAM

Warren and Paula Lewellen appealed from a judgment rendered by the United States Tax Court confirming the finding by the Commissioner of Internal Revenue of certain deficiencies in their income tax returns for the years 1972, 1973 and 1975. We have reviewed the records carefully and conclude that the judgment of the Tax Court should be affirmed.

The Tax Court determined that during the taxable years 1972, 1973 and 1975: (1) the Lewellen's farming operation on their Bedford, Massachusetts, farm was an activity not engaged in for profit within the meaning of section of 183 of the Internal Revenue Code (IRC), 26 U.S.C. §§ 183, and thus, that they could not deduct expenses therefrom; (2) they realized ordinary income under section 61 of the Code

and not capital gain income under section 1221 from the sale of parcels of the Bedford land and, therefore, were not entitled to the preferential tax treatment accorded to capital gains by section 1201; (3) they realized the amount of $12,500 from the sale of lot "A" in 1971 and not $9,500 as they claimed; (4) the untimely filing of their 1972, 1973 and 1975 tax returns was not due to reasonable cause and therefore they were subject to the penalties prescribed in section 6651.

We find that the Tax Court's findings are not clearly erroneous and that its treatment of the issues conforms with applicable statutory and regulatory requirements. There is ample support in the record for the conclusion that appellant's farming operation was an activity not engaged in for profit within the meaning of section 183 of the IRC. The Lewellen's failure to conduct their farming operation in a business-like manner (see Mr. Lewellen's testimony as to their book-

keeping Tr. 51-53, 56-59, 60-63), their lack of expertise in the farming industry, and failure to procure and heed expert advise (see Tr. 15-16, 43, 46, 47), the small amount of time they spent farming the land (see Tr. 109, 115-118), coupled with the inference that they could reasonably expect that the land utilized would appreciate in value, all point to the conclusion that the activity was not engaged in for profit. That this was their only farming venture and that in 29 years of operation it never generated a profit, only substantial losses, which the taxpayers were able to absorb, are circumstances which provide strong additional support for this finding. See: Treasury Regulations on Income Tax, 26 C.F.R. § 1.183-2(b).

Similarly, the Tax Court did not err in determining that the lots sold by the Lewellens from 1970 to 1974 were held by them primarily for sale to customers in the ordinary course of trade or business and thus,

the resulting gains were taxable as ordinary, not capital gain, income. The Bedford land was originally acquired by them as an investment; however, in 1957 they started to subdivide it and to sell real estate. Subdivisions were made in 1967, 1969 and 1970. Between 1957 and 1970 they sold a total of 32 lots. Prior to the sales they made substantial improvements on the lots (i.e., landscaping, utilities, roads). Advertising was minimal but no more was necessary since the land was located in a market favorable to the sellers. Income from these sales totaled $151,400 in the period from 1970 to 1974. During each of these years proceeds from the sale of lots constituted a substantial portion of the Lewellen's income. In addition, during this same period, they spent a significant amount of their time in activities related to the sale of their real estate. These facts, as to which there is little controversy, amply

support the conclusion that the lots were not held by them as capital assets but instead were held primarily for sale to customers in the ordinary course of trade or business. See McManus v. Commissioner, 65 T.C. 197 (1975); aff'd. 583 F.2d 443, 446-447 (9th Cir. 1978); cert. denied, 440 U.S. 959 (1979); United States v. Winthrop, 417 F.2d 905, 909-910 (5th Cir. 1969).

Appellants contend that in 1971 they realized $9,500 from the sale of lot A and not $12,500 as the Commissioner found and the Tax Court confirmed. The purchase and sale agreement and the sale of real estate account both show a sales price of $12,500 for lot A. The record discloses that the only proof offered by appellants at trial in support of their position consisted of Mr. Lewellen's testimony to the effect that the higher price was stated so that the buyer could obtain financing. The Tax Court did not give credit to this testimony

and as an appellate court we are without power to interfere with its discretion in so doing, unless the determination is unsupported by the record, which is not the situation here. 26 U.S.C. § 7482; Rule 52(a), F.R.Civ.P. Therefore, we sustain the finding of a sales price of $12,500 for lot A.

Likewise, we are not at liberty to interfere with the imposition of penalties under § 6651(a)(1) of the Code, for the untimely filing of their 1972 and 1973 returns, Shoemaker v. Commissioner, 38 T.C. 192 (1962), and cases cited therein; Commissioner v. Duberstein, 363 U.S. 278, 291-292 (1960); 26 U.S.C. § 7482, Rule 52(a) F.R.Civ.P.

Appellants request that certain amounts included as income for 1970 be removed. They contend that the $10,000 in proceeds from the sale of lot 9 had already been reported in their 1969 return and that its inclusion, again, in 1970 was a mistake. They also

argue that the amounts held in escrow for lots 7, 8 and 9 went for expenses and therefore did not constitute income. Our review of the record indicates that neither of these issues was raised in the Tax Court and that taxpayers had stipulated the facts adopted below as to both of them. Consequently, it would be improper for us to consider the merits of their contentions. Johnston v. Holiday Inns, Inc., 595 F.2d 890, 894 (1st Cir. 1979).

Taxpayers next contend that section 1251 of the Code should be applied to their farming operation to prevent their farm losses from becoming income. However, section 1251 does not help appellants in any way. It merely creates a mechanism to insure that when farm property is disposed of, previously deducted farm losses are recaptured as ordinary income. Clearly, it is inappropriate to determine when farm losses may be deducted, which is the issue involved here.

They also argue that if the farming operation and the sale of lots are treated as a single activity, the total operation would show a profit and the limitations of section 183 would not apply. But section 1.183-1(d) of the Treasury Regulations on Income Tax allows joint treatment of these two activities for purposes of section 183, only when farming income exceeds the expenses attributable exclusively to farming, i.e., those in excess of the expenses which would be incurred anyway in holding the land, like property taxes and mortgage interests. While here we have not been informed what portion of the farming expenses were attributable exclusively to farming, since the farming income was so small and the overall expenses so high (see p. 6 Tax Court Memo), we deem it highly unlikely that the farming income exceeded the expenses attributable exclusively to farming. Consequently, the farming operation and the real

estate sales may not be treated as a single activity for income tax purposes.

The points raised in taxpayer's amendment to their brief are also without merit. The Tax Court found that taxpayer's cattle operation was an activity engaged in for profit but that "due to inadequate records petitioner was unable to show whether this operation incurred in a separate loss" (see p. 15 Tax Court Memo). Together with the amendment to the brief taxpayers have filed a document (Ex. A) that they claim shows the losses derived from the cattle operation, thereby reducing the amount of nondeductible farm losses. The probative value, if any, of this document was a question proper for resolution by the Tax Court, not by this court. Apparently, taxpayers did not submit it at that stage (we have been unable to locate it in the record) and they may not press for its consideration for the first time now. Johnston v. Holiday Inns, Inc., supra.

The income taxapyers derived from the sale of lots was excluded from capital gain treatment not because the lots were stock in trade, as the Lewellens seem to believe, but because they were property "held by the taxpayer primarily for sale in the ordinary course of his trade or business," which is also excludable from capital gain treatment. See 26 U.S.C. § 1221(1). Thus their insistence that the Tax Court mistakenly determined that they held the lots as stock in trade, is mistaken.

Whatever could be said for appellants' arguments were this not an appeal from contrary findings below, our power as a reviewing court is limited. Even assuming we might ourselves reach a different conclusion if we were a court of first impression, we cannot set aside findings unless they are clearly erroneous.

Affirmed.

APPENDIX B

T.C. Memo. 1981-581

UNITED STATES TAX COURT

WARREN K. AND PAULA K. LEWELLEN, Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 12775-78 Filed October 5, 1981

Warren K. and Paula K. Lewellen, pro se.

Maureen T. O'Brien, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

DAWSON, Judge: This case was assigned to and heard by Special Trial Judge Marvin F. Peterson pursuant to the provisions of section 7456(c) of the Internal Revenue Code[1] and Rules

[1]All section references are to the Internal Revenue Code of 1954, as amended, unless otherwise indicated.

180 and 181, Tax Court Rules of Practice and Procedure.[2] The Court agrees with and adopts his opinion which is set forth below.

OPINION OF THE SPECIAL TRIAL JUDGE

PETERSON, Special Trial Judge: Respondent determined the following deficiencies and additions to tax under section 6651(a):

Taxable Year	Deficiency	Addition to Tax (Sec. 6651[a])
1970	$13,852.68	$ 0
1971	9,056.30	0
1972	11,922.39	2,980.60
1973	3,142.26	785.57
1974	3,439.77	0
1975	174.97	43.74

[2] Pursuant to the order of assignment, on the authority of the "otherwise provided" language of Rule 182, Tax Court Rules of Practice and Procedure, the post-trial procedures set forth in that rule are not applicable to this case.

Concessions having been made, the issues for decision are (1) whether petitioner's farming activities in Bedford, Massachusetts constituted an activity not engaged in for profit, within the meaning of section 183, during the taxable years at issue; (2) whether petitioners incurred a deductible loss due to the death of two cows during 1973; (3) whether petitioners incurred a deductible loss due to the destruction of their barn and its contents by fire during 1973; (4) whether the gain realized by petitioners from the sale of lots during the taxable years 1970 through 1974 is taxable as ordinary income; (5) whether petitioners realized an amount in excess of that reported from the sale of a certain parcel of land during 1971; and (6) whether petitioners are liable for the section 6651(a) addition to tax for the taxable years 1972, 1973 and 1975.

FINDINGS OF FACT

Some of the facts have been stipulated by the parties and are found accordingly.

Petitioners resided in Bedford, Massachusetts at the time they filed their petition herein. Petitioners filed their 1970, 1971 and 1974 joint Federal income tax returns with the Director, Andover Service Center, Andover, Massachusetts. Petitioners gave to Revenue Agent William Scully their 1972, 1973 and 1975 joint Federal income tax returns on December 2, 1975, May 25, 1976, and September 24, 1976, respectively. An Application for Automatic Extension of Time to File the United States Individual Income Tax Return (Form 4868) was filed by the petitioners for the taxable year 1975 on April 15, 1976. No other applications for extension were filed by petitioners for the taxable year 1975, nor were any ever filed for

the years 1972 and 1973.

During the years 1970 through 1975 petitioners utilized the cash receipts and disbursements method of accounting for Federal income tax purposes.

Petitioner Warren K. Lewellen (hereinafter petitioner) received a Bachelor of Science degree in engineering in 1930. He was employed by the Massachusetts Electric Company from 1935 to his retirement in 1970. Petitioner Paula K. Lewellen (hereinafter Paula) was a real estate broker from 1965 through 1975. Paula carried on her business out of the family residence, not exclusively.

Petitioner purchased a 131 acre parcel of farmland near Bedford, Massachusetts (hereinafter Bedford land) in 1946 for $12,500. Bedford is a developed suburban community with little land available for subdivision. Nine acres of the Bedford land were leased free to the Federal Government, Department of Defense

(hereinafter Department) for use as a Nike site from 1956 to 1978. The Department also had partial use of six other acres for an access road and tree cutting rights. The topography of the Bedford land, apart from the Department's Nike site and prior to subdivision by petitioner, was as follows:

Approximate Acreage	Topography
40 acres	Tillable Land
20 acres	Orchard/Pasture
57 acres	Forest Land/Wetland
5 acres	Farmhouse and Yard

The Bedford land was purchased at the behest of petitioner's father. No prior investigation as to the likelihood of profitable farming in the Bedford area was conducted by petitioner. During the first year of ownership petitioner hired the former owner to farm the land, but he was discharged when it was discovered that the farm was operating at a loss.

Petitioner and Paula thereupon farmed the land themselves from 1947 through the taxable years at issue, with the occasional help of their son Jonathan and unskilled laborers in the area. Petitioner's son was never paid a fixed wage based on the value of his services, rather, payments for work performed were based on his need. Petitioners have never been able to operate the farm at a profit although they experimented with different types of crops and farming methods, and often sought the advice of the Department of Agriculture. From 1947 through 1969 petitioner concentrated his efforts on the apple orchard, and although a good crop was usually harvested the farm expenses greatly exceeded the receipts for every year from 1947 through 1969.

In 1968 petitioner decided to try raising cattle, and, after deciding that the Bedford land would not support a herd of the size desired, petitioner bought 335 acres of land in

Ashland, New Hampshire (hereinafter Ashland land). Petitioner intended to sell the Bedford land and transfer the cattle to the Ashland land. As a result, in 1975 the Ashland land was lost through foreclosure. Petitioner had intended to raise Aberdeen Angus beef cattle on the Ashland land. Petitioner preferred this breed over others because of the disease resistance capability of the breed and its ability to reproduce at a relatively young age. In addition, petitioner selected the Aberdeen Angus breed because he was "favorably disposed to them (as) a youngster out in Iowa." Petitioner kept records of cattle purchases but no records of the natural increase in the size of the herd were kept. Petitioner purchased 8 cows in 1968 and 5 cows in 1969. In addition, on one occasion, petitioner and his family ate the beef from the cattle he raised.

In 1970 petitioner decided that since the orchard continued to be unprofitable he would

grow sweet corn and strawberries on 15 of the 40 tillable acres. Prior to making this change, petitioner consulted the Department of Agriculture to determine which crops could be grown profitably, and was told to plant blueberry bushes. Petitioner decided that this would require too much capital, however, and disregarded the advice.

For the taxable years at issue petitioner claimed the following expenses (including depreciation) and realized the following income, resulting in the indicated losses which petitioner claims are deductible farm losses:

Year	Expenses	Income	Loss
1970	$ 13,064.62	$ 1,303.85	$11,760.77
1971	20,044.29	1,594.60	18,449.69
1972	18,162.12	3,575.87	14,586.25
1973	20,240.81	6,629.28	13,611.53
1974	26,708.01	9,290.67	17,417.34
1975	12,030.08	5,339.11	6,690.97
TOTAL	$110,249.93	$27,733.38	$82,516.55

Sometime during 1973 two of petitioner's cows died. Petitioner discovered that the two cows had entered a field of ripe sweet corn through a gap in a fence, and proceeded to feed on the corn overnight until they died. Petitioner found the cows lying on their sides and determined after an examination of the carcasses that they had indeed died from excessive feeding. Petitioner did not have a post mortem examination performed on the animals to verify his conclusions since that would have cost $100 per animal. Petitioner's adjusted basis in each of the cows was $400. Petitioner claimed a depreciation deduction of $50 for each cow on his 1971 and 1972 Federal income tax returns. The

fair market value of each of the cows at the time of death exceeded $500. On his 1973 Federal income tax return petitioner claimed an ordinary loss deduction due to casualty for the death of the two cows.

On January 4, 1973, petitioner's barn and its contents were destroyed by fire. Petitioner had used the barn to store farm machinery and equipment and 2,000 bales of hay which he had grown. In addition, petitioner stored a number of antiques and other household items in the barn which were destroyed by the fire. Several large items, such as a garden tractor and an irrigation pump, were missing from the barn area after the blaze indicating that arson was the cause of the blaze. Shortly after the fire, petitioner compiled a detailed list of the missing and destroyed items indicating the purchase price of the item and the amount of depreciation previously claimed. Petitioner claimed a

loss based on the adjusted basis of the tools, machinery and equipment. Petitioner determined the amount of the loss for the barn by subtracting the insurance proceeds of $13,300 received for the barn from $13,316.21, the amount spent for erecting a new barn in 1973. The barn was fully depreciated at the time of the fire with the most recent depreciation deduction claimed in 1970 in the amount of $80. Petitioner spent $2,011,52 on the purchase of 2,000 bales of hay in 1973 to replace the 2,000 bales that had been destroyed. Petitioner received $2,000 as compensation from his insurer for the loss of the hay. The difference between these two sums was claimed as a casulaty loss. With respect to the household items and antiques, petitioner did not include in his 1973 income tax return any of the insurance proceeds received, but subtracted the insurance proceeds from the cost of the items lost and claimed the resulting sum as a casualty loss. Petitioners claimed a

deduction of $2,723.05, as follows:

Item	Amount
Tools, machinery and equipment	$ 343.67
New barn to replace fully depreciated old barn	16.21
Replace 2,000 bales of hay	11.52
Household items lost in barn	2,351.65

The household items (including the antiques) were valued at cost, although in a few instances the fair market value of the item was less than cost.

Petitioner divided the non-tillable sections of the Bedford land into residential lots and began selling these lots in 1957. From 1957 through 1978 petitioner sold the following lots, with each lot comprising an area of approximately one acre:

Location	Year	Lot Number
Notre Dame Road	1957	1
	1966	2
	1968	3,4,5,6
	1969	9
	1970	7,8,10
Davis Road	1971	A,D,E,K,L
	1972	C,F,G,M
	1973	H
	1974	J
	1976	B
Revolutionary Ridge Road	1977	2,3,4,10,11,12
	1978	5,6,8,9

The following is the amount realized and expenses incurred from the sale of lots during the taxable years at issue:[3]

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[3]The parties have agreed that petitioner had a basis without improvements in each of the lots on Notre Dame Road and Davis Road of $100 plus taxes and interest.

Year	Lot. No.	Selling Price	Closing Costs
1970	9	$10,000	$?
	7,8,10	31,500	1,039.50
1971	D	9,000	364.52
	E	10,000	82.60
	K	10,500	355.18
	L	10,500	181.50
1972	C	10,500	185.80
	F	10,500	305.50
	G	10,500	300.00
	M	10,500	220.90
1973	H	12,000	2,009.00[4]
1974	J	11,900	45.36

Petitioner filed plans with the Planning Board of the Town of Bedford, Massachusetts (hereinafter Planning Board), for the eight house lots for the subdivision on Notre Dame Road on October 16, 1967, and August 2, 1969. The Planning Board required petitioner to construct a road measuring 40 by 600 feet and to

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[4]This figure includes an oral stipulation made at trial concerning the amount of closing costs incurred by petitioner.

install an eight inch water main and underground electrical service. On July 2, 1970, a third plan was filed with the Planning Board for 12 house lots on Davis Road for which petitioner installed a 590 foot water main. The following summarizes part of the road and engineering costs incurred by petitioner in the development of the subdivisions:

Year	Road Costs	Engineering
1968	$4,512.50	$ 544.55
1969	7,813.62	375.96
1970	4,160.94	1,506.40
1971	5,208.08	1,163.00

Petitioner deducted these expenses in the year incurred. Originally, petitioner relied on word-of-mouth advertising to promote the sale of the lots, but in 1972, he spent $70 advertising his lots in the Boston Globe.

Most of the lot sales were made when petitioner was delinquent in property tax payments or when substantial medical expenses were incurred on behalf of petitioner's son. Paula, as a licensed real estate broker, handled the negotiation and sale of the lots. For the taxable years 1970 through 1974 petitioner claimed capital gains treatment for the gain realized from the sale of the lots.

In 1971 petitioner sold Lot A and reported $9,500 as the amount realized from the sale on his Federal income tax return. Copies of the purchase and sale agreement and Sale of Real Estate Account prepared by petitioner's attorney reflect a sales price of $12,500 for Lot A.

On April 4, 1973, petitioner suffered a broken neck when a tractor he was riding on tipped over. Petitioner did not recover from this injury until the latter part of 1973.

OPINION

The first issue for decision is whether petitioner's farming operation was an activity not engaged in for profit within the meaning of section 183. Section 183(a) provides that deductions attributable to an activity not engaged in for profit will not be allowed, except to the extent provided by section 183(b).[5] Section 183(b)(1) allows those deductions which would be allowable without regard to whether the activity is engaged in for profit. Section 183(b)(2) allows as a deduction those amounts that would be allowable only if such activity was engaged in for profit, "but only to the extent that the gross income derived from such activity for the taxable year exceeds the deductions allowable by reason of paragraph (1).: Section 183(c) defines an

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[5] In his notice of deficiency respondent calculated this portion of the deficiency in accordance with section 183(b).

activity not engaged in for profit as "any activity other than one with respect to which deductions are allowable for the taxable year under section 162 or under paragraph (1) or (2) of section 212." A rebuttable presumption of profit activity is raised provided gross income exceeds related expenses for any two of five consecutive taxable years ending with the taxable year at issue. Section 183(d). Since the farm operated at a loss at all times during its ownership by petitioner, the presumption is not raised. Accordingly, it must be determined whether petitioner's losses are deductible under section 162 or section 212(1) or (2).

Deductions are allowable under section 162 for expenses related to carrying on activities which constitute a trade or business, and under section 212 for expenses incurred in connection with activities engaged in for the production or collection of income, or for the management,

conservation or maintenance of property held for the production of income.

Petitioner bears the burden of proving that the activity was entered into or conducted for the purpose of making a profit. Golanty v. Commissioner, 72 T.C. 411, 426 (1979), affd. in an unpublished opinion 647 F.2d 170 (9th Cir. 1981); Boyer v. Commissioner, 69 T.C. 521, 537 (1977). Greater weight is given to objective facts than to petitioner's mere statement of intent. Section 1.183-2(a), Income Tax Regs.; Engdahl v. Commissioner, 72 T.C. 659, 666 (1979). The applicable standard is whether the taxpayer engaged in the activity with the primary or dominant motive of making a profit. Dunn v. Commissioner, 70 T.C. 715, 720 (1978), affd. 615 F.2d 578 (2d Cir. 1980). It is not required that the taxpayer have a reasonable expectation of making a profit; however, the expectation of profit must be bona fide. Dunn v. Commissioner, supra; Benz v. Commissioner,

63 T.C. 375, 383 (1974).

Some of the relevant factors to be considered in determining whether an activity is engaged in for profit are contained in section 1.183-2(b), Income Tax Regs. Briefly, these factors include: (1) the manner in which the taxpayer carries on the activity; (2) the expertise of the taxpayer or his advisors; (3) the amount of time expended by the taxpayer on the activity; (4) the expectation that the assets used in the activity may appreciate in value; (5) the success of the taxpayer in carrying on similar or dissimilar activities; (6) the taxpayer's history of income or losses with respect to the activity; (7) the amount of occasional profits, if any, that are earned; (8) the financial status of the taxpayer; and (9) the presence of personal pleasure or recreation in conducting the activity. No one factor is dispositive of the issue, but rather, all of the facts and circumstances must be considered.

Section 1.183-2(b), Income Tax Regs.; Allen v. Commissioner, 72 T.C. 28, 34 (1979).

After reviewing the record, we must conclude that with the exception of the cattle operation, petitioner's farming operation (farming operation) was an activity not engaged in for profit within the meaning of section 183, during the taxable years at issue. Several facts lead us to this conclusion.

First, petitioner did not operate the farm in a business-like manner. The regulations provide that conducting an activity in a business-like manner and maintaining "complete and accurate books and records" is an indication that the activity is engaged in for profit. Section 1.183-2(b)(1), Income Tax Regis. Although petitioner did keep fairly detailed books for each of the taxable years, they contained serious and glaring errors, and did not accurately reflect the farm operation in the manner generally needed for management and planning in

a true business operation. For instance, several items of personal expense, such as gasoline payments for Jonathan's car, were deducted as farm expenses. Further, non-farm related income was included in the gross receipts. Other items of income and expenses were mere estimates even though written receipts were available.

Another factor indicating petitioner lacked the requisite profit motive is the manner petitioner entered into and conducted the farming operation. Petitioner purchased the Bedford land because his father indicated it would be the smart thing to do, but petitioner did not investigate whether he could make money farming, nor did petitioner demonstrate that his father made any such prior study. See section 1.183-2(b)(2), Income Tax Regs. Further, although petitioner sought the advice of experts, such advice was routinely ignored because petitioner was unwilling to

make a significant commitment of capital. Another important factor is that petitioner worked full-time at another job while he operated the farm from 1946 through 1970. From at least 1970 through 1974, petitioner spent a significant amount of time preparing parcels of land for sale as lots in addition to tending to the farm. No qualified people were hired by petitioner to help him run the farm at any time. All of these factors rebut petitioner's contention that he had a bona fide expectation of operating the farm at a profit. See section 1.183-2(b)(3), Income Tax Regs.

Perhaps the most compelling factor indicating that petitioner lacked the requisite profit motive is that the farming operation produced losses for 29 consecutive years, including losses totalling $82,516.55 during

the taxable years at issue.[6] The presence of substantial losses over a period of many years is an important factor indicative of a taxpayer's intent. Jasionowski v. Commissioner, 66 T.C. 312 (1976); section 1.183-2(b)(6), Income Tax Regs. Further, petitioner had substantial outside income from his employement at Massachusetts Electric Company and from the sale of lots which along with the continued unprofitable operation of the farm strongly suggest that petitioner's farming operation was not engaged in for profit. See section 1.183-2(b)6) and (8), Income Tax Regs.

Petitioner contends that his farming operation was necessary to save the land from weeds and erosion thereby preserving its tillable character. Petitioner maintains that under section 212(2), his costs are deductible because

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[6]The record does not disclose the amount of losses incurred by petitioner from 1946 through 1969.

the amounts were expended for the conservation and maintenance of property. This is not enough, however, to prevent the application of section 183 because such amounts must be expended on property held for the production of income. Petitioner has failed to establish that the Bedford land was held for the production of income through the farm operation.

Accordingly, we find that petitioner's farm operation was an activity not engaged in for profit within the meaning of section 183.

Although we are convinced that petitioner's cattle operation was an activity engaged in for profit, due to inadequate records petitioner was unable to show whether this operation incurred a separate loss. There is a dispute between the parties concerning a casualty loss because of the death of two cows caused by overeating corn, but we need not decide whether a casualty was sus-

tained since petitioner is entitled to a deduction for the loss under section 165(c)(2), which allows a deduction for losses incurred in connection with property held for the production of income, in the amount of $500 per cow.

Petitioner claimed another casualty loss due to a fire which destroyed his barn, 2,000 bales of hay, tools, machinery and equipment, household goods and antiques. Section 165(c)(3) allows a deduction for losses by fire, storm, shipwreck or other casualty, or from theft, to the extent such losses exceeds $100. The amount deductible for nonbusiness property that is destroyed is limited to the difference between the value of the property immediately preceding the casualty and its value immediately after the casualty, but not in excess of an amount equal to the adjusted basis of the property, reduced by any insurance or other compensation. Helvering v. Owens, 305 U.S. 468

(1939); section 1.165-7(b)(1), Income Tax Regs.

With regard to the barn and hay loss, no deductible loss was sustained since the insurance proceeds received equaled or exceeded the adjusted basis of the property. Petitioner also lost several tools and some machinery and equipment in the fire. Petitioner claimed his adjusted basis of $343.67 as a casualty loss. As we stated above, the loss is limited to the lesser of the decrease in fair market value and the adjusted basis, reduced by any insurance or other compensation received. Helvering v. Owens, supra. The tools, machinery and equipment were not covered by insurance, and petitioner received no compensation for the destruction of these items. There is no evidence in the record concerning the fair market value of this class of items, but we are satisfied based on petitioner's description that the fair market value exceeded the adjusted basis. Accordingly,

$343.67 is allowed as a deduction.

The final category consists of household goods and antiques petitioner had stored in the barn. Petitioner claimed a $7,198.65 basis in these items, and taking into account insurance proceeds in the amount of $4,847, he arrived at a loss of $2,351.65. Petitioner did not maintain written records of the items stored, but shortly after the fire, he and Paula compiled a detailed list showing each item and its cost. Paula was a credible witness and she provided detailed testimony, and the list petitioner and Paula compiled, we find that petitioner suffered a $2,100 loss due to the destruction of the household goods and antiques. Cohan v. Commissioner, 39 F.2d 540 (2d Cir. 1930).

Based on the foregoing, we find that petitioner is entitled to a casualty loss deduction due to the fire in the amount of $2,443.67 ($343.67 + $2,100.00), less the $100 exclusion,

pursuant to section 165(c)(3).

The next issue for decision is whether petitioner realized ordinary or capital gain income from the sale of parcels of the Bedford land during the taxable years 1970 to 1974. Respondent contends that petitioner realized ordinary income under section 61 because the real estate lots sold were not capital assets under section 1221. Respondent maintains petitioner failed to meet the requirements of the capital asset definition of section 1221 because the property sold was held by petitioner "primarily for sale to customers in the ordinary course of his trade or business." Petitioner contends that he is entitled to treat the lots as capital assets because he was pursuing an orderly course of liquidation of the Bedford land and was not in the real estate business.[7]

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[7] Petitioner offered no evidence, and did not contend, that the provisions of section 1237 are applicable in this case.

Section 1221 defines a capital asset as any property held by the taxpayer, but not including property held "primarily for sale to customers in the ordinary course of his trade or business." Since the capital gains provisions are an exception to the normal tax rates, the definition of a capital asset must be narrowly applied and its exclusions interpreted broadly. Corn Products Co. v. Commissioner, 350 U.S. 46, 52 (1955). The Supreme Court has held the term "primarily" to mean "of first importance" or "principally." Malat v. Riddell, 383 U.S. 569, 572 (1966).

There have been a number of cases deciding whether property was held primarily for sale to customers in the ordinary course of business, but the ultimate decision in each case depends upon a consideration of all of the relevant facts and circumstances. As we stated in Thompson v. Commissioner, 38 T.C. 153, 163 (1962), affd. in part and revd. in part, 322 F.2d 122 (5th Cir. 1963): "The numerous cases

dealing with the question . . . have provided no rule-of-thumb by which an answer may be reached. The precise facts of each case are determinative, and of the various criteria to be considered, no one constitutes a decisive test. . . ." The criteria which are considered relevant in deciding this issue include the nature and purpose of the acquisition and ownership; the extent and nature of the taxpayer's efforts to sell the lots; the number, frequency, and substantiality of the sales; and the extent to which the owner or his agents engaged in sales activities by developing or improving the property, soliciting customers, and advertising. Thompson v. Commissioner, supra; McManus v. Commissioner, 65 T.C. 197 (1975), affd. 583 F.2d 443 (9th Cir. 1978), cert. denied 440 U.S. 959 (1979); United States v. Winthrop, 417 F.2d 905 (5th Cir. 1969). This issue is basically a factual one, and its resolution requires an objective rather

than subjective approach. Pointer v. Commissioner, 48 T.C. 906, 915 (1967), affd. 419 F.2d 213 (9th Cir. 1969).

The primary factor to consider is that since 1957, petitioner sold 31 lots over a 12 year period and during the taxable years at issue realized $151,400 from these sales. Such continuous and substantial sale of lots over a long period of time str-ngly suggests that the lots were held primarily for sale to customers in the ordinary course of business. Further, we do not believe petitioner's contention that he was following a course of liquidation in view of the substantial improvements made to the land for landscaping, the installation of utilities, the costs incurred for engineering and the extensive road construction, all completed prior to the sale of lots. Although there was only a limited amount of advertising, no more was necessary since the Bedford land was located in a seller's market, and Paula, as an active real

estate broker, handled the negotiation and sale of the lots. Paula's activities as a broker, combined with petitioner's physical work on the lots, further suggest that petitioner and Paula were in the business of selling real estate. We do recognize that at the time of acquisition this portion of the Bedford land may have been held for investment purposes, and such an intention is entitled to some evidentiary weight; however, the determinative factor is the purpose for which the property was held at the time of sale. Bynum v. Commissioner, 46 T.C. 295 (1966). Based on all of the facts in the instant case, considered in the light of the enumerated criteria, we hold that the lots were held by petitioner primarily for sale to customers in the ordinary course of business, and that the gain realized is taxable as ordinary income.

The next issue involves a determination of the amount realized from the sale of Lot "A" during 1971. Respondent contends the lot sold

for $12,500, while petitioner contends it sold for $9,500. The respondent's determination is presumptively correct, and petitioner has the burden of proving it wrong. Welch v. Helvering, supra; Rule 142(a), Tax Court Rules of Practice and Procedure. The respondent's determination is based on the purchase and sale agreement, and the Sale of Real Estate Account, both of which reflect a sales price of $12,500. Petitioner testified that the higher sales price was indicated so the purchasers could obtain financing, but that the actual amount received was only $9,500.

Although petitioner testified that other evidence was available to support his position, no evidence other than his own testimony was offered. Under these circumstances, we find his testimony insufficient to refute respondent's determination. Accordingly, respondent is sustained on this issue.

The final issue for decision is whether pe-

titioners are liable for the section 6651(a) addition to tax. Section 6651(a) imposes an addition to tax for failure to file a return on or before the date prescribed for filing such return (determined with regard to any extension of time for filing), unless the failure to file the return is due to reasonable cause and not due to willful neglect. The burden of providing that the addition to tax should not be imposed rests with petitioner. Bebb v. Commissioner, 36 T.C. 170 (1961).

Petitioner's 1972 return was due on April 15, 1973, but was not filed until December 2, 1975. On April 4, 1973, petitioner broke his neck but he recovered from this injury by the end of 1973. Although the illness of the taxpayer may constitute reasonable cause in certain instances, see generally Williams v. Commissioner, 16 T.C. 893, 906 (1951), in the instant case petitioner did not file his return until approximately two years after his recovery from the in-

jury and offered no further reasons for such delay. Accordingly, we find petitioner's failure to file was not due to reasonable cause and sustain respondent's determination.

With respect to the taxable years 1974 and 1975 petitioner testified that the delay in filing was due to a heavy workload and a lawsuit he was party to. The regulations promulgated under section 6651 provide in part: "If the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time, then the delay is due to reasonable cause." Section 301.6651-1(c)(1), Income Tax Regs. We find that the failure to timely file the 1974 and 1975 returns was not due to reasonable cause. Even assuming that much of petitioner's time was spent with the lawsuit, and preparing the lots for sale and tending to the farm, we do not believe that this constitutes reasonable cause. As we said in Dustin v. Commissioner,

53 T.C. 491, 507 (1969), affd. 467 F.2d 47 (9th Cir. 1972): "[W]e are of the opinion that a person exercising ordinary business care and prudence would not take on such a load that he could not fulfill his own legal obligations within the required time."

We have found that petitioner's failure to file his 1975 Federal income tax return was not due to reasonable cause, but we note that the applicable percentage rate is incorrect. Respondent determined that petitioner is liable for the full 25% addition to tax because petitioner filed his return more than five months after it was originally due. See section 301.6651-1(a), Income Tax Regs. Respondent's calculation disregards the fact that petitioner filed an application for an automatic two month extension, which must be taken into account. Therefore, the applicable percentage rate should be computed from the expiration of the period of extension. See

Gamble Construction Co. v. Commissioner, T.C. Memo. 1978-404.

Accordingly, we find that since petitioner's return was filed on September 24, 1976, and the automatic extension expired June 15, 1976, petitioner is liable for a 20% addition to tax under section 6651(a). See section 301.6651-1 (b)(2), Income Tax Regs.

Decision will be entered under Rule 155.

APPENDIX C

UNITED STATES TAX COURT

WARREN K. LEWELLEN AND PAULA K. LEWELLEN Petitioners	)
v.	) Docket No. 12775-78
COMMISSIONER OF INTERNAL REVENUE Respondent	)

RESPONDENT'S COMPUTATION FOR ENTRY OF DECISION

The attached computation is submitted, on behalf of the respondent, in compliance with the Court's opinion determining the issues in this case, together with a proposed decision which is being lodged concurrently with said computation.

This computation is submitted without prejudice to respondent's right to contest the correctness of the decision entered by the Court.

KENNETH W. GIDEON
Chief Counsel
Internal Revenue Service

Date:_____ By: _____
PETER J. PANUTHOS
Asst. District Counsel

OF COUNSEL:

AGATHA L. VORSANGER
Regional Counsel
MAUREEN T. O'BRIEN
Attorney
Internal Revenue Service
100 Summer Street, Room 1728
Boston, Massachusetts 02110
Tel. No. (617) 223-7065

AP:BOS:MTO:EH

COMPUTATION STATEMENT

In Re: Warren K. and Paula K. Lewellen
145 Davis Road
Bedford, MA 01730

Docket No. 12775-78

INCOME TAX

Year	Deficiency	Additions to Tax Section 6651(a)(1) IRC
1970	$13,852.68	$ 0
1971	9,056.30	0
1972	11,922,39	2,980.60
1973	1,885.02	471.26
1974	3,439.77	0
1975	174.97	34.99

The Memorandum Opinion of the Tax Court of the United States, filed October 5, 1981, and the deficiency notice, dated August 14, 1978, have been made the bases of the adjustments shown in these schedules.

Form 5278 (Rev. May 1978) — Department of the Treasury - Internal Revenue Service

Statement — Income Tax Changes

Return Form No. 1040 — Schedule No. 1

Name(s) of Taxpayer(s): WARREN P. & MRS. PAULA K. LEWELLEN

☐ Notice of Deficiency ☒ Other (specify) RULE 155

☐ Settlement Computation

	Tax Years Ended		
1. Adjustments to income	12/31/70	12/31/71	12/31/72
a.			
b.			
c.			
d.			
e.			
f.			
g.			
2. Total adjustments	NONE	NONE	NONE
3a. ☒ Taxable income ☐ Adjusted gross income ☐ Tax table income; b. As shown in: ☐ Preliminary letter dated ____ ☒ Notice of deficiency dated 8/14/73 ☐ Return as filed	43,595.89.	31,516.15.	38,016.42.
4. ☒ Taxable income as revised ☐ Adjusted gross income as revised ☐ Tax table income as revised	43,595.89.	31,516.15.	38,016.42.
5. Tax from ☐ Tax tables ☐ Schedule TC ☒ Tax rate schedules	13,866.03.	8,471.30.	11,247.39.
6. Alternative tax if applicable (from page ____)			
7. Tax surcharge	346.65	—	
8. Corrected tax liability (lesser of line 5 or 6, plus line 7)	14,212.68.	8,471.30.	11,247.39
9. Less credits (specify) a.			
b.			
c.			
10. Balance (line 8 less amounts on lines 9a through 9c)	14,212.68	8,471.30	11,247.39
11. Plus a. Tax from recomputing prior year investment credit			
b. Self-employment tax		585.00	675.00
c.			
12. Total corrected income tax liability (line 10 plus amounts on lines 11a through 11c)	14,212.68	9,056.30	11,922.39
13. Total tax shown on return or as previously adjusted	360.00	⊖	⊖
14. Increase or (decrease) in tax (difference between lines 12 and 13)	13,852.68	9,056.30	11,922.39
15. Additions to the tax (listed below) SEC 6651(a)(1) IRC	⊖	⊖	2,980.60

Form 5278 (Rev. May 1978) — Department of the Treasury - Internal Revenue Service

Statement — Income Tax Changes

Return Form No. 1040 — Schedule No. 1

Name(s) of Taxpayer(s)

WARREN K. AND PAULA K LEWELLEN

☐ Notice of Deficiency ☒ Other (specify) R-E 15C

☐ Settlement Computation

	Tax Years Ended		
1. Adjustments to income	12/31/73	12/31/74	12/31/75
a. ORDINARY INCOME	<2236.00>		
b. CASUALTY LOSS	<2342.67>		
c. ORDINARY LOSS	<1,000.00>		
d.			
e.			
f.			
g.			
2. Total adjustments	<5579.67>	NONE	NONE
3a. ☒ Taxable income / ☐ Adjusted gross income / ☐ Tax table income — b. As shown in: ☐ Preliminary letter dated ____ ☒ Notice of deficiency dated 2/14/78 ☐ Return as filed	12,073.05	12,773.55	1,633.14
4. ☒ Taxable income as revised / ☐ Adjusted gross income as revised / ☐ Tax table income as revised	6,493.38	12,773.55	1,633.14
5. Tax from ☐ Tax tables ☐ Schedule TC ☒ Tax rate schedules	1,093.74	2,453.39	234.97
6. Alternative tax if applicable (from page ____)			
7. Tax surcharge			
8. Corrected tax liability (lesser of line 5 or 6, plus line 7)	1,093.74	2,453.39	234.97
9. Less credits (specify) a. PERSONAL EXEMPTION CREDIT	—	—	60.00
b.			
c.			
10. Balance (line 8 less amounts on lines 9a through 9c)	1,093.74	2,453.39	174.97
11. Plus a. Tax from recomputing prior year investment credit			
b. Self-employment tax	791.28	986.38	
c.			
12. Total corrected income tax liability (line 10 plus amounts on lines 11a through 11c)	1,885.02	3439.77	174.97
13. Total tax shown on return or as previously adjusted	0	0	0
14. Increase or (decrease) in tax (difference between lines 12 and 13)	1,885.02	3439.77	174.97
15. Additions to the tax (listed below) SEC 6651(a)(1) IRC	471.26	0	34.99

SELF-EMPLOYMENT TAX COMPUTATION

1971								
	SELF EMPLOYMENT INCOME						$ 4396.16	
	LIABILITY AMOUNT FOR TAX						7800.00	
	TAX @ .075 X 7800.00 =						$ 585.00	
1972								
	SELF EMPLOYMENT INCOME						$ 3777.17	
	MAXIMUM AMOUNT FOR TAX						9000.00	
	TAX @ .075 X 9000.00 =						$ 675.00	
1973								
	SELF-EMPLOYMENT INCOME						$ 9891.00	
	MAXIMUM AMOUNT FOR TAX						10800.00	
	TAX @ .08 X 9891.00 =						$ 791.28	
1974								
	SELF-EMPLOYMENT INCOME						$ 12,485.88	
	MAXIMUM AMOUNT FOR TAX						13,200.00	
	TAX .079 X 12,485.88 =						986.38	

Form 3623 (Rev. May 1973)

Department of the Treasury—Internal Revenue Service

Statement of Account

Schedule Number: 1A

Name of Taxpayer: WARREN K. AND PAULA K LEWELLEN

Kind of Tax: INCOME

Docket Number: 12775-78

In Reply Refer To: AP:BOS:MTO:EH

	Tax Year Ended 12/31/70		Tax Year Ended 12/31/71			
	Date	Amount	Date	Amount	Date	Amount
Revised Liability		$ 14,212.68		$ 9,056.30		$
Assessment (tax on return)		360.00		NONE		
Additional Assessments						
Overassessments						
Total Assessments		360.00		NONE		
Increase (Decrease) in Assessment		$ 13,852.68		$ 9,056.30		$
Assd Liability		14,212.68		9,056.30		
Payments	5/4/71	2,113.00		NONE		
Less Reassessed Credit	4	1,753.00		NONE		
Total Payments		360.00		NONE		
Balance Due (or overpayment)		$ 13,852.68		$ 9,056.30		$

Tax Year Ended	Internal Revenue Code Reference: Section	Year	Date Return Filed	Date Agreement Signed	Statute Extended To	Date Deficiency Notice Mailed	Date Claim Filed	Amount of Claim
		19__						
		19__						
		19__						

Form 3623 (Rev. 5-73)

Form 3623 (Rev. May 1979)	Department of the Treasury—Internal Revenue Service **Statement of Account**	Schedule Number 1B

Name of Taxpayer: WARREN K AND PAULA K LEWELLEN

Kind of Tax: INCOME	Docket Number: 12775-78	In Reply Refer To: AP:BO:AITO:EH

Tax Year Ended 12/31/72

	TAX		ADDITIONS TO TAX SECTIONS 6651, 6653 ETC			
	Date	Amount	Date	Amount	Date	Amount
Revised Liability		$ 11,922.39		$ 2,980.60		$
Assessment (tax on return)		NONE		NONE		
Additional Assessments						
Overassessments						
Total Assessments		NONE		NONE		
Increase (Decrease) in Assessment		$ 11,922.39		$ 2980.60		$
vised Liability		11,922.39		2,980.60		
Payments		NONE		NONE		
Less Refunds or Credit						
Total Payments		NONE		NONE		
Balance Due (or overpayment)		$ 11,922.39		$ 2,980.60		$

Tax Year Ended	Internal Revenue Code Reference: Section	Year	Date Return Filed	Date Agreement Signed	Statute Extended To	Date Deficiency Notice Mailed	Date Claim Filed	Amount of Claim
		19__						
		19__						
		19__						

Form 3823 (Rev. May 1979)

Department of the Treasury—Internal Revenue Service

Statement of Account

Schedule Number 1C

Name of Taxpayer WARREN K. & PAULA K. LENELLEN

Kind of Tax INCOME

Docket Number 12775-78

In Reply Refer To AA:COS:ATTO:EH

Tax Year Ended 12/31/73

	TAX		ADDITION TO TAX SECTION 6653(b) IRC			
	Date	Amount	Date	Amount	Date	Amount
Revised Liability		$ 1,885.02		$ 471.26		$
Assessment (tax on return)		NONE		NONE		
Additional Assessments						
Overassessments						
Total Assessments		NONE		NONE		
Increase (Decrease) in Assessment		$ 1,885.02		$ 471.26		$
vised Liability		1,885.02		471.26		
Payments		NONE		NONE		
Less Refunds or Credit						
Total Payments		NONE		NONE		
Balance Due (or overpayment)		$ 1,885.02		$ 471.26		$

Tax Year Ended	Internal Revenue Code Reference: Section	Year	Date Return Filed	Date Agreement Signed	Statute Extended To	Date Deficiency Notice Mailed	Date Claim Filed	Amount of Claim
		19__						
		19__						
		19__						

Form 3823 (Rev. 5-79)

PAGE 1 OF 1

Form 3623 (Rev. May 1979)

Department of the Treasury—Internal Revenue Service

Statement of Account

Schedule Number: 1 D

Name of Taxpayer: WARREN K. AND PAULA K. LENELLETT

Kind of Tax: INCOME

Docket Number: 12775-78

In Reply Refer To: AP:COS:MTO:EH

	Tax Year Ended					
	12/31/74					
	Date	Amount	Date	Amount	Date	Amount
Revised Liability		$ 3439.77		$		$
Assessment (tax on return)		NONE				
Additional Assessments						
Overassessments						
Total Assessments		NONE				
Increase (Decrease) in Assessment		$ 3,439.77		$		$
vised Liability		3,439.77				
Payments		NONE				
Less Refunds or Credit						
Total Payments		NONE				
Balance Due (or overpayment)		$ 3,439.77		$		$

Tax Year Ended	Internal Revenue Code Reference: Section	Internal Revenue Code Reference: Year	Date Return Filed	Date Agreement Signed	Statute Extended To	Date Deficiency Notice Mailed	Date Claim Filed	Amount of Claim
		19__						
		19__						
		19__						

Exhibit 8

Form 3623 (Rev. May 1979) | Department of the Treasury—Internal Revenue Service | **Statement of Account** | Schedule Number E

Name of Taxpayer: WALTER K. AND PAULA K. LEWELLEN

Kind of Tax: INCOME | Docket Number: 12775-78 | In Reply Refer To: AP:BOS:MTO:EH

Tax Year Ended: 12/31/75

	TAX		ADDITION TO TAX SECTION 6653(a)(1)&(2)			
	Date	Amount	Date	Amount	Date	Amount
Revised Liability		$ 174.97		$ 34.99		$
Assessment (tax on return)		NONE		NONE		
Additional Assessments						
Overassessments						
Total Assessments		NONE		NONE		
Increase (Decrease) in Assessment		$ 174.97		$ 34.99		$
vised Liability		174.97		34.99		
Payments		NONE		NONE		
Less Refunds or Credit						
Total Payments		NONE		NONE		
Balance Due (or overpayment)		$ 174.97		$ 34.99		$

Tax Year Ended	Internal Revenue Code Reference: Section	Year	Date Return Filed	Date Agreement Signed	Statute Extended To	Date Deficiency Notice Mailed	Date Claim Filed	Amount of Claim
		19__						
		19__						
		19__						

Form 3623 (Rev. 5-79)

CERTIFICATE OF SERVICE

This is to certify that I have this day mailed, postage prepaid, a copy of the Jurisdictional Statement with separate appendix to the Solicitor General, Department of Justice, Washington, D.C. 20530.

This the 8th day of June, 1983.

Warren K. Lewellen, pro se

Paula K. Lewellen, pro se

The Jurisdiction Statement with separate appendix (8½" x 11") was mailed to Mr. Michael L. Poup, U.S. Dept. of Justice, Tax Division, Washington, D.C. 20530.

No. 82-2132

In the Supreme Court of the United States

OCTOBER TERM, 1983

WARREN K. LEWELLEN, ET AL., APPELLANTS

v.

COMMISSIONER OF INTERNAL REVENUE

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION TO DISMISS

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-2132

WARREN K. LEWELLEN, ET AL., APPELLANTS

v.

COMMISSIONER OF INTERNAL REVENUE

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

MOTION TO DISMISS

The Solicitor General, on behalf of the Commissioner of Internal Revenue, moves, pursuant to Sup. Ct. R. 16(1), that the appeal be dismissed.

1. This is a federal income tax case in which the court of appeals affirmed several essentially factual determinations by the Tax Court related to appellants' farming and real estate operations. Appellants have captioned their filing a "jurisdictional statement," but plainly there are no grounds for invoking the appellate jurisdiction of this Court. Moreover, appellants did not file a notice of appeal, as required by Sup. Ct. R. 10. Accordingly, the appeal should be dismissed for lack of jurisdiction.

2. Treating the papers as a petition for a writ of certiorari (see 28 U.S.C. 2103), the petition should be denied because it fails to present any issue warranting the attention of this Court. The pertinent facts are as follows: petitioners

engaged in a farming operation on certain property owned by them near Bedford, Massachusetts, for a period of 29 years, including the taxable years in issue, 1970-1975. They experimented with different types of crops and farming methods, but never generated a profit, only substantial losses, in all of those years (J.S. App. 10-11). Between 1957 and 1978, they subdivided and sold residential lots from nontillable portions of the Bedford land (*id.* at 15-16). The Commissioner of Internal Revenue determined deficiencies for the years in question, which were sustained by the Tax Court in virtually all respects (*id.* at 8-29).

With respect to the two principal issues, the Tax Court found: (a) that petitioners' farming operation was an "activity not engaged in for profit" within the meaning of Section 183 of the Internal Revenue Code of 1954 (26 U.S.C.) and therefore that they could not deduct the expenses therefrom to the extent those expenses exceeded income generated by the farm; and (b) that the lots sold by them during the taxable years in question were held by them primarily for sale to customers in the ordinary course of a trade or business, within the meaning of the 1954 Code, Section 1221 (26 U.S.C. (& Supp. V)), and therefore that they were not entitled to capital gain treatment of the proceeds (J.S. App. 18-22, 24-26). The court of appeals affirmed the Tax Court in all respects, determining that the Tax Court's factual findings were not clearly erroneous and that its treatment of the issues conformed to the applicable law (*id.* at 1-7).

3. Petitioners do not appear to contest in this Court the rulings of the courts below (see J.S. 7), but they do raise several fact-bound contentions not raised earlier (see J.S. 5-6). These relate to a claimed "late filing" of the Commissioner's notices of deficiency with respect to the years 1970 and 1971 (J.S. 5, Question 1), whether certain of petitioners' transactions, not heretofore put in issue, have been correctly treated by the Commissioner and the courts (J.S. 5-6,

Questions 2-9), and whether arithmetical errors were made in the computation of petitioners' deficiencies (J.S. 8-9).

The "late filing" claim apparently has reference to the statutory limitations period for assessments provided by the 1954 Code, Section 6501 (26 U.S.C. (& Supp. V)). There is nothing in the record, however, to establish that the notices in question were not timely filed. The other contentions also appear insubstantial. In any event, there is no reason for this Court to review issues not raised in the trial court in the absence of unusual circumstances indicating a miscarriage of justice. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n. 7 (1977); *Hormel* v. *Helvering*, 312 U.S. 552, 556-557 (1941). Here, all the new issues raised by petitioners, other than the "late filing" claim, relate to matters that were stipulated in the Tax Court, and petitioners offer no reason why any of these matters could not have been contested in the Tax Court.

It is therefore respectfully submitted that the appeal be dismissed and, treating the papers as a petition for a writ of certiorari, that the petition should be denied.

REX E. LEE
Solicitor General

JULY 1983

DOJ-1983-07

NO. 82-2132

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WARREN K. LEWELLEN, ET AL., APPELLANTS

v.

COMMISSIONER OF INTERNAL REVENUE

ON APPEAL FROM THE

UNITED STATES COURT OF APPEALS FOR

THE FIRST CIRCUIT

BRIEF OPPOSING SOLICITOR GENERAL'S MOTION TO DISMISS

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FARM LOSSES

The Solicitor General asserts in his paragraph 2 that appellants in 29 years "never generated a profit" which is true, "only substantial losses" which is untrue. Our tax problems were handled in 1963 to 1969 by a Tax Consultant who changed our accounting to eliminate the losses in at least some of those years. Unfortunately he did not return our records and he died so we have no details. Presently the farm makes a small profit largely because we sell our produce at retail instead of wholesale. Unlike "nine-to-five" people who work for wage or salary, farmers work mostly from "dawn-to-dusk" with no salary other than profit from the farm and when losses are sustained I.R.S. wants to tax them. We believe this to be wrong.

CAPITAL GAINS TREATMENT

In an effort to obtain farm profits appellants purchased a large farm in New Hampshire and in accordance with our notification to I.R.S. was paying for it by selling land from the Bedford farm as houselots. Later I.R.S. claimed the lots were held primarily for sale to customers in the ordinary course of a trade or business and denied us capital gains treatment. We believe this to be wrong. Furthermore, in our view, if the lot income was from ordinary trade or business -- and our trade was farming, then that income should be applied to reduce farm losses.

LATE FILING OF 1970-1971

NOTICES OF DEFICIENCY

In paragraph 3 the Solicitor General asserts "There is nothing in the record, however, to establish that the notices in question were not timely filed."

We point out that the record does show indirectly that the three (3) year period of Section 6501 of the 1954 Code had elapsed before the I.R.S. audits began in 1975. We know of no I.R.S. action on 1970 and 1971 before the audits of 1972, 3, 4 and 5 were started.

a) Stipulation No. 3 to the Tax Court says "The petitioners gave to Revenue Agent Scully their 1972, 1973 and 1975 Federal Income Tax Returns on December 2, 1975, May 25, 1976 and September 24, 1976 respectively.

b) Copies of the returns for 1970-75 inclusive were included as exhibits to the Tax Court. Agent Scully

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a) Stipulation No. 3 to the Tax Court says "The petitioners gave to Revenue Agent Scully their 1972, 1973 and 1975 Federal Income Tax Return on December 2, 1975, May 25, 1976 and September 24, 1976, respectively.

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had written on the face of the 1972, 1973 and 1975 returns the words "original delinquent" "secured by audit" and on the 1974 return the words "reintroduced into work flow". There were no notations on the 1970 and 1971 returns (indicating that they were not then in contention).

c) The cause of the delinquencies is indicated in Stipulation No. 6 which says "on January 4, 1973 a barn and its contents were destroyed by fire". The three (3) large barns and a silo were interconnected and within eighty (80') feet of the house which was downwind hence severely threatened with fire and water damage. Other damage was caused by well meaning friends and neighbors who "saved" our house belongings thoroughly scattering and losing some of our records. While cleaning up the debris Mr. Lewellen turned a tractor over upon himself and almost died of spinal column injuries. The fire, our

son's kidney failure and his paralysis, Mrs. Lewellen's cancer and Mr. Lewellen's spinal injury pushed I.R.S. accounts out of mind.

MATTERS CONSIDERED INSUBSTANTIAL BY SOLICITOR GENERAL

The matters considered insubstantial by the Director in his paragraph 3 add up to more than $100,000 which is a very substantial amount to the appellants especially when interest and penalties of as much as 26% per year are added and are likely to bankrupt a family farm.

REASON FOR NO CONTEST OF I.R.S. ERRONEOUS CLAIMS

The reason that the appellants did not contest the I.R.S. claims, other than "farm losses" and "capital gains" in the Tax Court was that such I.R.S. claims and errors were unknown to the appellants before their appearance before the Tax Court Judge. Furthermore, we had confidence in our government's honesty. The I.R.S. attorney presented the judge a memorandum entitled "Memorandum of Authorities" passing us a copy. We had no opportunity to read or study the I.R.S. memorandum which we thought was a listing of the results of other cases. Actually the "Memorandum of Authorities" included many baseless assertions, half truths and untruths. We endeavored to contest some of the claims before the Appeals Court but all attention seemed to be directed to the "farm losses" and "capital gains" questions.

Therefore, in our appeal to the Supreme Court we are limiting our contest to the claims other than the "farm losses" and the "capital gains" with the hope that these very costly erroneous claims will be considered by the Supreme Court.

PRAYER THAT THE SOLICITOR GENERAL'S MOTION TO DISMISS BE DENIED

It is therefore respectfully submitted that the Motion to Dismiss be denied. We believe that to disregard our appeal would result in a miscarriage of justice.

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AFFIDAVIT OF SERVICE

I, WARREN K. LEWELLEN, pro se, hereby certify that I have served three (3) copies of the within Brief in Opposition to the Solicitor General's Motion to Dismiss Case No. 82-2132, postage prepaid, upon both the following:

1. Rex E. Lee, Solicitor General
   Department of Justice
   Washington, D.C. 20530

2. Michael L. Paup, Chief
   Appellate Division
   Attorney General's Office
   Washington, D.C. 20530

Dated:

8-20-83

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